

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL HILDEBRANDT

Claimant,

vs.

CS-00-0441-662

AP-00-0451-213

GOODYEAR TIRE AND RUBBER CO.

Self-Insured Respondent.

ORDER

Claimant requests review of the May 26, 2020, preliminary Order issued by Administrative Law Judge (ALJ) David J. Bogdan.

APPEARANCES

Roger D. Fincher appeared for Claimant. Whitney L. Casement appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held May 20, 2020, with Claimant's Exhibits A.1-5 and Respondent's Exhibits B.1-3; the transcript of the Preliminary Hearing held October 3, 2019; the transcript of the Discovery Deposition of Michael Hildebrandt; the narrative report of Dr. Stechschulte concerning his Court-ordered independent medical examination; and the pleadings and orders contained in the administrative file.

ISSUES

1. Are K.S.A. 44-508(f) and (g) unconstitutional?
2. Did Claimant meet with personal injury from an accident arising out of and in the course of his employment with Respondent? In particular, was the alleged accident the prevailing factor causing the alleged injury, medical condition and need for medical treatment?
3. Is Claimant entitled to unauthorized and future medical treatment?

FINDINGS OF FACT

Claimant works for Respondent as a Banbury operator. Claimant is fifty-seven years of age and worked for Respondent for twenty-two years. In 1992, Claimant fell down a well

while working for the City of Topeka. Claimant injured his right knee, fractured multiple ribs, punctured a lung and fractured three vertebrae. Claimant was hospitalized and required an arthroscopy for the right knee injury. Claimant developed deep venous thrombosis (DVT) after the arthroscopy. Claimant received a settlement for his injuries, but the basis of the settlement is unknown. Claimant did not require ongoing medical treatment for the right knee injury.

On December 12, 2018, Claimant was at work completing training on the use of a fork truck. Claimant confirmed he used the truck as part of his regular work. As Claimant stepped off the truck, he missed a step and landed hard on the concrete floor with his right foot. Claimant heard his right knee pop and he immediately experienced pain, but he continued working. The pain did not go away and Claimant noticed swelling about the knee. Claimant later noticed weakness and instability. Claimant started wearing a brace due to the right knee symptoms.

Claimant reported the accident to Respondent. Claimant initially treated at Premise Health. Claimant subsequently developed DVT, which caused a pulmonary embolism. Claimant started Coumadin therapy for his DVT and pulmonary embolism. Claimant was seen at Cotton-O'Neil Internal Medicine on February 12, 2019. Claimant reported he fell at work in December and reported right knee pain. There is no record of the prior right knee surgery in 1992. An MRI was interpreted as showing a full-thickness medial meniscus tear with moderate to advanced degenerative joint disease of the medial compartment and a lateral meniscus tear. Claimant was referred to the orthopedic department, and he was seen by an orthopedist on March 4, 2019. Claimant denied a history of a prior knee surgery. Physical examination was notable for medial joint tenderness, mild effusion and a positive McMurray's sign. X-rays were interpreted as showing mild degenerative changes of the medial compartment, and a contusion of the medial femoral condyle. Claimant was diagnosed with a medial meniscus tear and a partial meniscectomy was recommended. It does not appear the cause of the medial meniscus tear was discussed. On March 6, 2019, Claimant was evaluated for his DVT for surgical clearance.

On March 29, 2019, Claimant was evaluated at his counsel's request by Dr. Hopkins. Dr. Hopkins reviewed the history of the accident of December 12, 2018, but he was not informed of the 1992 surgery. Examination was notable for swelling of the right knee with limited range of motion, tenderness and clicking of the right knee. No instability was noted, and Claimant demonstrated pain during McMurray's testing. Dr. Hopkins was unable to read the disc with the MRI scan. Dr. Hopkins diagnosed right knee pain. Dr. Hopkins thought Claimant had some preexisting degenerative changes on MRI, but after the December 12 accident Claimant was found to have medial and lateral meniscus tears complicated by the development of DVT and a pulmonary embolism. Because Claimant did not have a prior right knee injury, Dr. Hopkins thought the prevailing factor causing the meniscus tears, DVT and embolism was the December 12 accident. Dr. Hopkins recommended additional medical treatment. Dr. Hopkins charged \$500 for the evaluation.

At the request of Respondent, Claimant was evaluated by Dr. Joyce on June 13, 2019, with an authorization to treat Claimant's injuries if they were work-related. Dr. Joyce noted the history of the December 12 incident and the 1992 injury and right knee surgery. Dr. Joyce also noted Claimant developed blood clots and required Coumadin treatment for eighteen months in association with the prior knee injury and surgery. The recent development of Claimant's DVT and pulmonary embolism was noted, as well. Examination was notable for an antalgic gait, pain to palpation, crepitus during range of motion testing, and swelling. The MRI was interpreted by Dr. Joyce as showing a marked loss of cartilage in the medial compartment and patellofemoral joint space, an extruded medial meniscus, and a marked stress reaction to the medial femoral condyle. Dr. Joyce diagnosed severe degenerative arthritis and degenerative tears in the right knee. Dr. Joyce did not think the December 12 event was the prevailing factor causing those conditions, but could have produced the stress reaction to the medial femoral condyle temporarily aggravating the condition, and which likely had resolved at the time of examination. Dr. Joyce thought Claimant would require a total knee replacement for his non-work-related conditions. Dr. Joyce did not express an opinion on the cause of the DVT and subsequent pulmonary embolism, and did not issue an impairment rating.

On October 3, 2019, Dr. Stechschulte was appointed to perform a Court-ordered independent medical examination. Dr. Stechschulte evaluated Claimant on March 13, 2020. Dr. Stechschulte reviewed Claimant's history, including the 1992 accident and the December 12, 2018, event. Dr. Stechschulte noted constant right knee pain, with popping and weakness. Dr. Stechschulte found signs of the prior 1992 surgery, and noted a BMI of 39%. Examination was notable for crepitus and an antalgic gait. Dr. Stechschulte was not provided a CD of the MRI, but reviewed the MRI report. X-rays were interpreted as showing bone-on-bone at the medial compartment, moderate to severe loss of joint space at the patellofemoral compartment and osteophytes. An X-ray of the left knee revealed near symmetric degenerative changes in the left knee, compared to the right. Dr. Stechschulte diagnosed severe degenerative arthritis of the right knee with an exacerbation, medial and lateral meniscus tears of the right knee, preexisting degenerative changes of the ACL and PCL with an exacerbation, right knee DVT chronically treated with anticoagulants and bilateral pulmonary embolism chronically treated with anticoagulants. Dr. Stechschulte did not believe the December 12 event was the prevailing factor for the clinical or radiographic findings, or for the current and ongoing right knee symptoms. Dr. Stechschulte thought Claimant's medical condition was primarily caused by progressive degenerative arthritis, and the event of December 12 was a trigger causing "symptomatic recognition" of long-standing degenerative arthritis. Dr. Stechschulte recommended a total knee replacement, and thought Claimant reached maximum medical improvement for any exacerbation caused by the December 12 event.

Following the May 26, 2020 preliminary hearing, ALJ Bogdan found the accident of December 12, 2018, was not the prevailing factor causing Claimant's alleged injury, medical condition, and resulting disability or impairment, and Claimant's demand for

medical treatment was denied. Claimant was awarded \$500 under the unauthorized medical benefit allowance for Dr. Hopkins' evaluation. Claimant appealed.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Board should rule provisions of K.S.A. 44-508 are unconstitutional for violating due process rights and equal protection. Claimant argues he met his burden of proving the work accident was the prevailing factor causing new symptoms and a change in the physical structure of the knee consistent with a new injury. Claimant maintains he is entitled to an award of unauthorized and future medical treatment. In contrast, Respondent argues Claimant failed to prove the work accident was the prevailing factor for his alleged injury, medical condition, and need for treatment, and Claimant's injury was caused by a degenerative condition. Respondent also argues the Board does not have legal authority to decide the constitutional issues raised by Claimant, or, in the alternative, no constitutional violation occurred.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

1. The Appeals Board does not possess legal authority to address Claimant's constitutional arguments.

Claimant first argues provisions of K.S.A. 44-508 are unconstitutional. The Appeals Board does not possess the authority to review the constitutionality of the Kansas Workers Compensation Act.⁴ In addition, the Appeals Board's review authority of preliminary orders is limited to issues of whether the employee suffered an accident or resulting injury, whether the injury arose out of and in the course of employment, whether notice was given or whether certain defenses pertaining to compensability apply.⁵ The constitutionality of the Act is not included in the jurisdictional grounds for an appeal of a preliminary order. Therefore, Claimant's request for review of the preliminary Order based on the

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

⁵ See K.S.A. 44-534a(a)(2).

constitutionality of the Act must be dismissed. Claimant may preserve the issue for regular hearing.

2. Claimant failed to meet his burden of proving the work-related accident was the prevailing factor causing Claimant's medical condition and current need for treatment.

Claimant argues he met his burden of proving he sustained a compensable injury based on the sudden onset of symptoms and new findings consistent with a new injury. Respondent argues Claimant failed to meet his burden of proving he sustained a compensable right knee injury, and Claimant's alleged injury was idiopathic. To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁶ The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁷ An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.⁸ Furthermore, the accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.⁹ An injury occurring as a result of the natural aging process is not considered to arise out of and in the course of employment.¹⁰

Claimant met his burden of proving the event of December 12, 2018, occurred. Claimant testified in his deposition he was at work performing work tasks when he accidentally missed a step while dismounting a truck and landed hard on his right foot. Although Claimant later testified at the preliminary hearing the date of accident was December 18, 2018, which was adopted by the parties in their briefs and the ALJ in his Order, the underlying description of the event is unchanged. The Board finds the date discrepancy is a simple oversight. Claimant was consistent in his histories to the treating and evaluating health care providers of the event. The Board finds and concludes Claimant met his burden of proving the event of December 12, 2018, occurred.

⁶ See K.S.A. 44-508(d).

⁷ See K.S.A. 44-508(d),(g).

⁸ See K.S.A. 44-508(f)(2).

⁹ See K.S.A. 44-508(f)(2)(B).

¹⁰ See K.S.A. 44-508(f)(3)(A).

The primary issue is whether the event of December 12, 2018, was the prevailing factor causing Claimant's alleged medical condition and resulting need for medical treatment. Claimant sustained a prior right knee injury in 1992 in conjunction with more serious injuries requiring hospitalization and anticoagulant therapy, but Claimant did not require ongoing medical treatment for the right knee. Claimant testified he felt an immediate onset of right knee pain and swelling after the December 12, 2018, event. Claimant also testified he experienced instability and weakness of the right knee, but this was not noted by the treating or examining physicians. There is no evidence Premise Health or Cotton-O'Neil Internal Medicine were informed of Claimant's prior knee injury or addressed causation. Dr. Hopkins thought Claimant sustained medial and lateral meniscus tears, complicated by the development of DVT and a pulmonary embolism, and Dr. Hopkins thought these conditions were caused by the December 12 event in the absence of a prior right knee injury. Dr. Hopkins was not aware of Claimant's prior knee injury or DVT, which undermines the credibility of Dr. Hopkins' opinions.

Dr. Joyce diagnosed severe degenerative arthritis and degenerative tears necessitating a total knee replacement, and he thought the December 12, 2018, event temporarily aggravated Claimant's condition. Dr. Joyce did not opine on the cause of the DVT or pulmonary embolism. Dr. Stechschulte, the Court-ordered examining physician, also diagnosed severe degenerative arthritis, with medial and lateral meniscus tears and degenerative changes of the ACL and PCL unrelated to the December 12, 2018, event. Dr. Stechschulte also thought the December 12, 2018, event was a triggering event likely rendering a preexisting degenerative condition symptomatic. Dr. Stechschulte's finding of near-symmetric degenerative changes in the left knee is consistent with his conclusion Claimant's medical condition and need for treatment was due to a preexisting, degenerative condition.

The Board agrees with the ALJ, and finds the opinions of Dr. Joyce and Dr. Stechschulte more credible on the issues of diagnosis and causation. The event of December 12, 2018, at the most, produced a temporary aggravation of Claimant's preexisting degenerative condition. As a result, Claimant failed to meet his burden of proving the December 12, 2018, event was the prevailing factor causing Claimant's current medical condition and need for medical treatment.

3. The Appeals Board does not possess jurisdiction to consider Claimant's request for medical compensation.

Finally, Claimant raised on appeal the issues of unauthorized and future medical treatment. The Appeals Board's review authority of preliminary orders is limited to issues of whether the employee suffered an accident or resulting injury, whether the injury arose out of and in the course of employment, whether notice was given or whether certain

defenses pertaining to compensability apply.¹¹ The issues of entitlement to unauthorized or future medical are not preliminary issues the Board may consider at this time. Therefore, Claimant's request for review of those issues is dismissed.

By statute, preliminary hearing findings and conclusions are neither final nor binding, and may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by the Kansas Workers Compensation Act.¹³

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the application for review is dismissed in part and the Order of ALJ David J. Bogdan, dated May 26, 2020, is affirmed.

IT IS SO ORDERED.

Dated this 27th day of July 2020.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Roger D. Fincher
Whitney L. Casement
Hon. David J. Bogdan

¹¹ See K.S.A. 44-534a(a)(2).

¹² K.S.A. 44-534a.

¹³ K.S.A. 2018 Supp. 44-551(l)(2)(A).